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Case No. 619

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

WATSON MOULTHROPE,
Petitioner

vs.

EDWARD MATUS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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vs.

EDWARD MATUS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner, Watson Moulthrope, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Errors of the State of Connecticut, entered in the above case on November 25, 1952.

OPINIONS BELOW

The opinion of the Superior Court of the State of Connecticut (R. 9-10) was by memorandum of decision and is not reported. The opinion of the Supreme Court of Errors of the State of Connecticut (R. 42-46) is reported at 139 Conn. 272, 93 A. 2d 149.

JURISDICTION

The judgment of the Supreme Court of Errors of the State of Connecticut was entered on November 25, 1952 (R. 46-47). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The Courts below were called upon to decide whether petitioner is a fugitive from justice within the meaning of the Constitution of the United States (Art. IV, Sec. 2) and the federal Extradition Act (18 U.S.C. 3182). The federal questions were first raised by petitioner in his reply to respondent's return to the writ of habeas corpus (R. 7-9), in which he claimed that he was not a fugitive from justice, that he was in Connecticut as a result of the forcible action of Florida, and that Florida had waived and lost its jurisdiction over his person. The Superior Court of Connecticut determined these matters adversely to petitioner (R. 9-10). The questions were stated and overruled by the Superior Court in its finding (R. 15-16), and were raised by petitioner on appeal to the Connecticut Supreme Court of Errors in his assignment of errors (R. 16-17).

The Supreme Court of Errors, in ruling adversely to petitioner (R. 42-46), passed directly upon the questions raised, stating:

> The decisive question presented by the plaintiff in his appeal is whether he is a fugitive from justice within the meaning of the federal constitution and the statutes permitting the extradition from one state to another of a person charged with crime. U. S. Const. Art. IV, § 2; 62 Stat. 822, 18 U.S.C. § 3182 (Sup. 5, 1952). He claims that he is not a fugitive from justice because he was taken from Florida forcibly and against his will by compulsory legal process (R. 43).

The Court stated further:

> He claims, therefore, that he is not now a fugitive from Florida justice because her authorities turned him over to the Connecticut authorities without his consent and thus voluntarily released him. . . . Even though the

plaintiff was removed from Florida by legal process and against his will, he is none the less a fugitive from justice in the sense required by a reasonable and salutary construction of the constitution and the statutes (R. 45).

QUESTIONS PRESENTED

After conviction in Florida of murder, petitioner, while in custody of the Florida authorities under a mittimus to carry a life sentence into effect, was forcibly and against his will delivered to representatives of Connecticut pursuant to an extradition warrant of the Governor of Florida and, with the permission and assistance of the State of Florida, was removed from Florida and taken to Connecticut. Florida now seeks to have petitioner returned from Connecticut as a fugitive from justice. The questions presented are:

(1) Whether, under such circumstances, petitioner is a fugitive from the justice of Florida within the meaning of the Constitution of the United States and the federal Extradition Act.

(2) Whether, under such circumstances, Florida relinquished jurisdiction over petitioner's person and waived its right to have him returned by extradition.

(3) Whether a State may compel by extradition the return of a person who, while he was in such State's custody upon conviction of a crime therein, left such State not only other than voluntarily but by such State's compulsory process.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the second clause of Article IV, Section 2, of the United States Constitution, which reads as follows:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found

> in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Also involved is the federal Extradition Act, as amended (62 Stat. 822, 18 U.S.C. 3182), the pertinent section of which is set forth in Appendix A.

STATEMENT

The primary facts are not in dispute. They are stated in the finding of the Connecticut Superior Court (R. 13-15) and are summarized in the opinion of the Connecticut Supreme Court of Errors (R. 42-43).

In 1925, petitioner was convicted of the crime of robbery by a Florida court and was sentenced to serve five years in prison. After he had served approximately two years, the Florida Board of Pardons granted him a conditional pardon, "upon the express understanding and condition that he lead a sober, peaceable and law-abiding life." Petitioner then went to Connecticut, where, in 1929, he was convicted of another crime and sentenced to state prison. While serving this sentence, he escaped and returned to Florida. On March 19, 1930, he was convicted of the crime of murder in a Florida criminal court.

On March 27, 1930, after conviction but before sentencing, the Governor of Florida honored a requisition of the Governor of Connecticut and issued a warrant of extradition. Thereafter on the same day, petitioner was sentenced by the Florida court to imprisonment for life, and the court issued a mittimus commanding his delivery to the Florida state prison. The mittimus was given to a Florida deputy sheriff, who took custody of petitioner; but instead of delivering him to the state prison, the deputy sheriff took petitioner out the back door of the courthouse, drove him around Jacksonville for

about two hours, while his attorney was seeking a writ of habeas corpus in another court, and then drove him to the Florida-Georgia state line, where he formally turned him over to the representatives of the State of Connecticut (R. 22-25). Petitioner had made a statement in open court and to the Florida authorities that he was fighting extradition to Connecticut until he had served his Florida sentence (R. 23, 25-26). Petitioner was removed from Florida and taken to Connecticut "with the permission and assistance of the State of Florida and its duly authorized officers and agents" (Finding, par. 9, R. 14), and was removed from Florida "under compulsory process at a time when the State of Florida had him in its custody" (Finding, par. 11, R. 15).

In Connecticut, petitioner was tried and convicted of the crimes of escape and theft of motor vehicle and sentenced to a long term in state prison, where he has since remained.

In 1948, the Florida Board of Pardons withdrew the conditional pardon granted petitioner in 1928 and ordered his return to custody to serve the unexpired portion of his original robbery sentence and to serve the sentence of life imprisonment for murder. On October 8, 1949, the Governor of Florida made requisition on the Governor of Connecticut for the return of petitioner as a fugitive from justice. Thereupon the Connecticut Governor issued a warrant to respondent, a Connecticut state policeman, requiring his delivery to the Florida authorities.

The present proceedings were brought to prevent the extradition from Connecticut to Florida. On February 27, 1951, the Connecticut Superior Court issued judgment dismissing the writ of habeas corpus (R. 10-11). On November 25, 1952, the Connecticut Supreme Court of Errors issued judgment, finding no error and affirming the judgment of the Superior Court (R. 46-47).

The Supreme Court of Errors held that even though the plaintiff was removed from Florida by legal process and against his will, he is none the less a fugitive from justice; and that although Florida's authorities turned him over to Connecticut under compulsory process and without his consent, Florida lost no control over him and is entitled to his return (R. 45).

SPECIFICATION OF ERRORS

The Court below erred:

(1) In holding that petitioner, although forcibly removed from Florida against his will by compulsory legal process, with the permission and assistance of Florida officers, while he was in their custody, is none the less a fugitive from Florida justice.

(2) In refusing to hold that Florida, by forcibly removing petitioner against his will from the State of Florida when petitioner was in its custody, relinquished its jurisdiction over his person and waived its right to have him returned by extradition.

(3) In finding no error in the judgment of the Superior Court and in affirming said judgment.

REASONS FOR GRANTING THE WRIT

1. This matter presents questions of large importance concerning interstate rendition which have not been, but should be, settled by this Honorable Court. A determination of the issues here will quiet the wide confusion now existing as to the right of States to demand the return as fugitives of persons who departed from their borders other than voluntarily or whom such States ousted against their will; the obligation or authority of States to render on requisition per-

sons who departed from the requisitioning States through the compulsory process of the requisitioning States; and the rights of persons to be free of restraint under the authority of the constitutional and statutory provisions concerning extradition when they have not in fact fled from the justice of the demanding States but have been forcibly expelled therefrom.

While this Court has held that the motive with which a person leaves a State is unimportant in the determination of whether such person is a fugitive from justice,[1] in each case in which the matter has been considered, the person left the State voluntarily. In no case which we have been able to find has this Court been called upon to determine directly whether a person is a fugitive from the justice of a State when he leaves such State by compulsion, whether the compulsion is of the State whence he departed or of some other authority.

Similarly this Court has not been called upon to determine directly the effect on a State's right to have a person returned by extradition of its actions in forcibly ousting such person at a time when he was in its custody. But this Court has announced that upon such compulsory ouster, "the State whence he is removed can no longer require his appearance before her tribunals." *Taylor* v. *Taintor*, 16 Wall. 366, 370 (1872). And this Court has held that where a person is charged with crimes in two States, the State which has him in custody "may choose to waive the exercise of its jurisdiction by surrendering the fugitive to answer to the laws" of the other State. *Roberts* v. *Reilly*, 116 U. S. 80, 96-97 (1885). The Connecticut Supreme Court of Errors in the present case refused to hold that Florida, by extraditing petitioner while in its custody

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[1] *Roberts* v. *Reilly*, 116 U. S. 80, 97 (1885); *Appleyard* v. *Massachusetts*, 203 U. S. 222, 226-27 (1906); *Bassing* v. *Cady*, 208 U. S. 386, 392 (1907); *Drew* v. *Thaw*, 235 U. S. 432, 439 (1914).

waived its right to have petitioner returned by extradition thereafter and is thus in conflict with the principles enunciated by this Court in *Taylor* v. *Taintor, supra,* and *Roberts* v. *Reilly, supra.*

The absence of a determination by this Court of the questions raised by this case has resulted in widely different interpretations by the courts, state and federal, of the constitutional and statutory provisions involved. Some jurisdictions hold that even where the leaving is involuntary, the State whence the person departed may cause his return by extradition; but in the preponderance of such cases, the compulsion causing the actual departure was that of some other authority than the demanding State. These cases are collected in Appendix B. Where the compulsion was that of the demanding State itself, the courts are in conflict. Some refuse extradition on the ground that the ousted person is not a fugitive from justice (see Appendix C). Some follow the principle that there is an outright and permanent waiver by the demanding State (see Appendix D). Others hold the action of the chief executive of the demanding State ousting the person by extradition to be tantamount to a pardon or commutation of sentence (see Appendix E). Still others, while supporting the principle of waiver, hold that the waiver is temporary only and does not preclude the return of the ousted person by extradition (see Appendix F).

In light of these differences in the construction of an important constitutional provision affecting substantial rights of States and individuals, and the frequency with which the questions presented by this case arise, it is essential that this Court, in the interests of uniformity in the administration of justice, define the meaning and scope, under the facts of this case, of the constitutional and statutory provisions relating to extradition.

2. The decision of the Connecticut Supreme Court of Errors in the present case is in direct conflict with *In re Whittington*, 34 Cal. App. 344, 167 Pac. 404 (1917), both on the proposition that a person involuntarily ousted by the demanding State is not a fugitive from such State, and also on the proposition that the ouster of the demanding State effects a waiver of that State's right to have the ousted person returned. The decision of the California District Court of Appeal is set forth in Appendix G. Further, on the question of waiver, the decision in the instant case is in direct conflict with the decision of the Supreme Court of Illinois in *People ex rel. Barrett* v. *Bartley*, 383 Ill. 437, 50 N.E. 2d 517 (1943).

The *Whittington* case, although not decided by the highest court of California,[2] is probably the most widely cited case on the subject of interstate rendition, where the departure from the demanding State was involuntary. It was specifically disapproved by the Connecticut Supreme Court of Errors in the present case (R. 45). Its principles have been followed in varying degrees or disapproved in many other jurisdictions and have been discussed, favorably and adversely, in the law reviews.[3]

The facts in the *Whittington* case parallel almost exactly those of the case at bar. Whittington, while in the custody of

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[2] The *Whittington* case was distinguished by the California Supreme Court, without disapproval of its principles, in *In re Marzec*, 25 Cal. 2d 794, 154 P. 2d 873 (1945), in which Marzec *voluntarily* left California on a condition expressed in a parole agreement he made with California that he return when released by New Mexico, to whose authorities he was given with his consent. The *Whittington* case was followed by the District Court of Appeal, Third District, in *Ex Parte Drake*, 233 P. 2d 931 (1951), affirmed on another ground by the California Supreme Court, 38 Cal. 2d 195, 238 P. 2d 566 (1951).

[3] Approving principles of the *Whittington* case: 31 Harv. L.R. 493 (1918), 16 Mich. L.R. 198 (1918), 5 Va. L.R. 287 (1918). *Contra:* 18 Columbia L.R. 70 (1918), 2 Minn. L.R. 303 (1918), 81 U. Pa. L.R. 772 (1933), 83 U. Pa. L.R. 798 (1935).

Texas for a crime committed there, was extradited from Texas to California to answer for another crime. Upon the disposition of the California case, Texas sought to have him returned. The Court held (134 Cal. App., at p. 347) that:

> . . . the prisoner did not leave the state of Texas by any voluntary act of his own. He was taken out of the state against his will and under compulsory process, at a time when the state of Texas had him in custody with full right and power to prosecute him for the offense for which it now seeks to have him returned. Not only may it be said that he is not a fugitive because he did not voluntarily leave that state, but because also the state of Texas voluntarily relinquished the jurisdiction of its courts over his person and waived its right to thereafter have him brought back from the California jurisdiction to answer for the same offense.

The *Whittington* case was approved in *People ex rel. Barrett* v. *Bartley*, 383 Ill. 437, 50 N.E. 2d 517 (1943); *Ex parte Youstler*, 40 Okl. Cr. 273, 268 Pac. 323 (1928); *Church* v. *Hackenberg*, Ct. of Common Pleas for Union Co., Pa., No. 100, Jan. Term, 1937.[4] It was disapproved in a number of cases, many of which however present different factual situations; these cases are gathered in Appendix H. The impact of the *Whittington* case on the unsettled status of the law on interstate rendition of persons who left the demanding State involuntarily is summarized by the Supreme Court of North Dakota in *Ex parte Amundson*, 74 N.D. 134, 20 N.W. 2d 340 (1945), in which many of the cases referring to it favorably and adversely are listed.

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[4] This case is discussed by Forrest Revere Black in his article, "Interstate Rendition as Applied to a Person Brought Involuntarily into the Surrendering State," 29 Journ. Crim. Law and Criminology 309 (1938).

The case of *Barrett* v. *Bartley, supra,* is the leading case on the proposition that when a State has a person in custody and surrenders him by extradition, the surrender operates as a waiver of its jurisdiction. One McLaughlin, while serving a sentence in an Illinois prison, was paroled; but before the effective date of the parole, he was extradited to Wisconsin. Later, after serving prison sentences in Wisconsin and Ohio, he was extradited from Ohio back to Illinois, where he sought his release on habeas corpus on the ground that Illinois had waived its jurisdiction when it extradited him to Wisconsin. The Supreme Court of Illinois held that the writ of habeas corpus was correctly granted, stating that the Illinois jurisdiction had been forever waived. The Court said (383 Ill., at p. 446) that it was convinced:

> . . . that the waiver of jurisdiction of a State over a fugitive is a prerogative of the Governor, and that his extradition warrant takes priority over all State process by which the fugitive is held; that a prisoner cannot be handed from one jurisdiction to another for the purpose of trial, conviction and service of a new sentence, before being returned to the asylum State for service of the unexpired sentence, without violating his constitutional rights.

The case at bar is also in conflict with the reasoning of the Oklahoma Criminal Court of Appeals in *Ex parte Hart,* ___Okl. Cr.___, 244 P. 2d 859 (1952), *Adams* v. *Waters,* ___Okl. Cr.___, 237 P. 2d 914 (1951), and *Ex parte Youstler,* 40 Okl. Cr. 273, 274-75, 268 Pac. 323, 324 (1928); cf. *Ex parte Guy,* 41 Okl. Cr. 1, 269 Pac. 782 (1928). In the *Hart, Adams,* and *Youstler* cases, while holding that once a person was back in the State from which he had been extradited he could be subjected to the service of the unexpired portion of his sentence, approved the doctrine of the *Barrett* case that the

extradition of a person by a State caused a waiver of that State's right to have him returned by extradition.[5] See Appendices D, E and F for other cases on the effect of the extradition of a person by a State on such State's right to require his return.

3. It is submitted that under the circumstances of this case, the rendition of petitioner by Connecticut to Florida is repugnant to Article IV, Section 2, of the Constitution and to the federal Extradition Act. While it is true that the constitutional provision should not be so narrowly interpreted as to enable offenders against the laws of a State to find permanent asylum in the territory of another State (*Appleyard* v. *Massachusetts*, 203 U. S. 222, 228), still there is a point beyond which the meaning of the words used may not be enlarged by interpretation without destroying their function in the clause. The words "fled from justice" imply a volitive act by the person leaving the State. One can not be said to "flee" the justice of a State when he uses every means at his disposal to remain in the State and satisfy that justice; when he is continuously in custody, both before and after his departure; and when the State which now demands him back was the very instrumentality of his involuntary expulsion.

Unless it clearly appears that the person to be rendered is a fugitive from justice, it is violative of his rights under Article IV, Section 2, of the Constitution to restrain him for the purpose of extradition. As stated by this Court in *Innes* v. *Tobin*, 240 U. S. 127, 131:

> . . . it is not open to question that its provisions [federal Extradition Act] expressly or by necessary implication

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[5] In the syllabus by the court in *Ex Parte Hart*, *supra*, it was stated: ". . . such delivery [to a sister State by extradition] is a waiver of the jurisdiction of this State over the person and a waiver of the right of the State to demand the return of such person thereafter as a fugitive from justice."

> prohibited the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State. [Citing *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80; *Hyatt* v. *Corkran*, 188 U. S. 691; *Bassing* v. *Cady*, 208 U. S. 386, 392.]

Before a Governor can lawfully comply with the demand for extradition, it must appear that the person demanded is a fugitive from the justice of the State making the demand. *Roberts* v. *Reilly*, 116 U. S. 80, 95; *Hyatt* v. *Corkran*, 188 U. S. 691, 709.

When in 1930 the Governor of Connecticut made requisition on the Governor of Florida for petitioner, the Florida Governor was under no compulsion to honor it. Florida, having petitioner in its custody, had exclusive jurisdiction over him until its demands, in connection with both his conviction for murder and his violation of parole, were met. As stated by this Court in *Taylor* v. *Taintor*, 16 Wall. 366, 371 (1872):

> If the laws of the latter State [State of asylum] have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before.

See also *Taylor* v. *Taintor*, 36 Conn. 242, 254 (1869). Thus the Governor of Florida was required to choose whether to allow Florida justice to take its course, or whether to waive jurisdiction over petitioner in favor of Connecticut's demand. If he had chosen the former and petitioner had later been released, there could be no doubt that compliance with the Connecticut requisition would then be imperative. But he chose the latter course, and petitioner, over his protest and while his attorney was seeking to prevent the extradition by

habeas corpus, was forcibly expelled by the authorities of the State of Florida. Surely that action constituted the waiver referred to in *Roberts* v. *Reilly*, 116 U. S. 80, 96-97 (1885). See also Appendices D and E.

Since petitioner is not a fugitive from Florida justice, and since Florida has waived its right to have petitioner returned by extradition, the judgment of the Connecticut Supreme Court of Errors in affirming the dismissal of petitioner's writ of habeas corpus was erroneous.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,
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FEBRUARY 1953.

APPENDIX A

The pertinent section of the federal Extradition Act (62 Stat. 822, 18 U.S.C. 3182) is as follows:

§ 3182. Fugitives from State or Territory to State, District or Territory.

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

APPENDIX B

Cases supporting extradition where departure from demanding State was involuntary but compulsion was of an authority other than that of demanding State.

Spencer v. *Hamilton*, 12 F. 2d 976 (C.A. 8, 1926). Federal authorities brought Spencer, Leavenworth inmate, to Texas for trial in State court and then returned him to Kansas. In upholding extradition from Kansas to Texas, court took pains to point out (p. 977) that while in Texas Spencer remained in custody of Federal authorities and that "the state of Texas

did not voluntarily relinquish over his person a control and custody which it never acquired."

State ex rel. Shapiro v. *Wall*, 187 Minn. 246, 244 N.W. 811 (1932). Federal authorities removed relator from Illinois to Kansas federal prison. Relator subsequently went to Minnesota, which honored Illinois' requisition. Case emphasizes conflict between jurisdictions by noting that Illinois had previously sought relator's extradition from Kansas, but Kansas courts discharged him on the theory that he was not a fugitive from justice.

In re Cohen, 104 N.J. Eq. 560, 146 Atl. 423 (1929). Cohen, paroled by New York, committed federal crime in New York and on sentence was brought by federal officers to New Jersey penitentiary. Extradition back to New York upheld.

In re Anthony, 198 Wash. 106, 87 P. 2d 302 (1939). After conviction of federal crime in California, federal officers brought Anthony to penitentiary in Washington. Extradition to California upheld.

People ex rel. McFadden v. *Meyering*, 358 Ill. 442, 193 N.E. 475 (1934). Federal agents and Chicago police brought McFadden from Wisconsin to Illinois. In extraditing him back to Wisconsin, the Illinois court pointed out (p. 445) that "Wisconsin did not voluntarily surrender him to the authorities of this State," and that the facts of this case did not present the question of waiver of the right of extradition by Wisconsin arising out of "the forcible expulsion of the relator from, and by the act of, that State."

Hart v. *Mangum*, 146 Ga. 497, 91 S.E. 543 (1917). Tennessee authorities turned Hart over to federal officers; federal court in Tennessee sentenced him to Georgia penitentiary. Georgia court upheld extradition to Tennessee.

APPENDIX C

Cases asserting that where person is expelled from demanding State by its compulsory process, he is not a fugitive from justice.

In re Whittington, 34 Cal. App. 344, 167 Pac. 404 (1917). Discussed at pp. 10-11, *supra;* opinion set forth in Appendix G.

Ex parte Youstler, 40 Okl. Cr. 273, 268 Pac. 323 (1928). Discussed at pp. 11-12, *supra.*

In re Jones, 154 Kan. 589, 121 P. 2d 219 (1942). Jones released from Louisiana state prison to federal authorities on order of Governor of Louisiana conditioned upon his being returned to Louisiana after completion of federal sentence. Jones did not participate in order of release (p. 595), which was "made entirely without regard" to his wishes (p. 596). Federal authorities brought him to Kansas prison. Louisiana governor's order held to be commutation of sentence and "manifestly," Jones "could not be a fugitive from justice of the demanding state of Louisiana" (p. 596).

Church v. *Hackenberg,* Ct. of Common Pleas, Union Co., Pa., No. 100, Jan. Term, 1937 (see footnote 4, *supra*).

APPENDIX D

Cases following principle that by expelling a person a State waives its right to his later extradition.

People ex rel. Barrett v. *Bartley,* 383 Ill. 437, 50 N.E. 2d 517 (1943). Discussed at p. 11, *supra.*

In re Whittington, 34 Cal. App. 344, 167 Pac. 404 (1917). Discussed at pp. 10-11, *supra;* opinion set forth in Appendix G.

Ex parte Hart, ___Okl. Cr.___, 244 P. 2d 859 (1952); *Adams* v. *Waters*, ___Okl. Cr.___, 237 P. 2d 914 (1951); *Ex parte Youstler*, 40 Okl. Cr. 273, 268 Pac. 323 (1928). Oklahoma cases discussed at pp. 11-12, *supra*.

State ex rel. Falconer v. *Eberstein*, 105 Neb. 833, 836, 182 N.W. 500 (1921). When a person is charged with offenses in two States and is arrested in one, its governor may extradite such person "and such surrender of the prisoner will operate as a waiver of the jurisdiction of the asylum State."

In re Hess, 5 Kan. App. 763, 768, 48 Pac. 596 (1897). Oklahoma Territory waived its jurisdiction by delivering Hess to Kansas and by such delivery can no longer require his appearance before her tribunals.

People ex rel. Gallagher v. *Hagan*, 69 N.Y.S. 475, 477-78, 34 Misc. 85 (1901). Governor may by extradition waive the enforcement of a State's claims upon a prisoner in favor of the claims of another State.

APPENDIX E

Cases holding extradition of prisoner to be pardon or commutation of sentence.

Ex parte Guy, 41 Okl. Cr. 1, 269 Pac. 782 (1928). Delivery of prisoner to federal authorities, even with condition that he be returned to State authorities after satisfaction of federal claim, is in effect a pardon. Court states (p. 5) that if prisoner had been sentenced to federal penitentiary outside of Oklahoma, he could not have been brought back.

State v. *Saunders*, 288 Mo. 640, 652, 232 S.W. 973 (1921). Delivery of Iowa prisoner to Missouri authorities on requisition operated as pardon, despite condition that the prisoner be returned to Iowa in case Missouri failed to convict.

In re Jones, 154 Kan. 589, 121 P. 2d 219 (1942). Order of Louisiana governor under which prisoner was released, delivered to federal authorities and removed to Kansas was commutation of the State sentence. On requisition of Louisiana, held Jones was not fugitive from justice.

APPENDIX F

Cases ruling that ouster of prisoner constitutes only temporary waiver by ousting state or no waiver.

Johnson v. *Lowry,* 183 Ga. 207, 188 S.E. 23 (1936). By turning parolee over to federal authorities who, after sentence, conveyed him to Georgia prison, Alabama only temporarily waived the unserved portion of parolee's sentence; extradition to Alabama allowed.

Com. of Pa. ex rel. Kamons v. *Ashe,* 114 Pa. Superior Ct. 119, 173 Atl. 715 (1934). Kamons, while Pennsylvania prisoner, extradited to Ohio; Ohio, after acquitting him, returned him to Pennsylvania. The Court stated (173 Atl. at p. 717): "Undoubtedly, the commonwealth of Pennsylvania waived rights when it surrendered Kamons to the state of Ohio, but the extent of such waiver was limited by the agreement of the executives [permitted by Pennsylvania statute] that, if Kamons was acquitted on the charge of murder, he should be returned to the state of Pennsylvania."

State v. *Swain,* 147 Or. 207, 216, 31 P. 2d 745 (1934). After an information had been filed against Swain in Oregon, but before indictment, Oregon extradited him to California. On his return to Oregon, he claimed that his prior extradition waived Oregon's rights. Held that since he had not been subjected to jeopardy, prosecution in Oregon was not barred. Oregon's right to extradite from California not involved.

Jurczyszyn v. *Michigan Parole Board*, 316 Mich. 529, 25 N.W. 2d 609 (1947). Extradition of parolee from Michigan to Ohio did not constitute a permanent waiver of Michigan's right to commit him for parole violation. Right of Michigan to have him returned by extradition not involved. *Whittington* case distinguished.

United States ex rel. Hunke v. *Ragen*, 158 F. 2d 644 (C.A. 7, 1947). Under Illinois law, Illinois did not waive or lose jurisdiction over parolee by extraditing him to Wisconsin and can imprison him for balance of his sentence. Right of Illinois to have him returned by extradition not involved.

APPENDIX G

In the Matter of the Application of CALVIN K. WHITTINGTON for a Writ of Habeas Corpus.

[California District Court of Appeals, 34 Cal. App. 344, 167 Pac. 404 (1917)]

APPLICATION for a Writ of Habeas Corpus originally made to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

JAMES, J.—Petitioner herein claims to be illegally restrained of his liberty and prosecutes this writ for the purpose of securing discharge from custody of the police authorities of the city of Los Angeles and from the custody of the sheriff of Tarrant County, state of Texas. The latter officer claims the right to the custody of the petitioner under the authority of a warrant of rendition issued by the Governor of California upon a requisition made by the Governor of Texas. The facts shown are these: Petitioner was heretofore arrested in the state of Texas

for a crime alleged to have been there committed, and was taken into custody by the peace officers at Fort Worth. While there held in custody a requisition issued by the Governor of California was honored by the Governor of the state of Texas. This requisition upon the Governor of Texas was made upon a showing that petitioner here had theretofore committed the crime of murder in the state of California. The police authorities at Fort Worth, upon having presented to them the Governor's warrant of that state then in the hands of the agent of the state of California, relinquished control and custody of the petitioner and he was immediately taken under the warrant mentioned to the state of California to answer to the charge of murder. The latter charge was not pressed to trial in California. It was dismissed or otherwise disposed of; whereupon the Governor of Texas made requisition upon the Governor of California to have petitioner returned to Texas to answer to the same offense for the alleged commission of which he was held under arrest at the time the police authorities of Fort Worth relinquished him into the hands of the state agent to be returned to California. Petitioner has never been released from custody since he was first arrested in the state of Texas for the crime there alleged to have been committed by him. It is his contention now that under these facts he cannot be considered as being a fugitive from justice within the meaning of that term as it is included in section 2 of article IV of the Constitution of the United States. That provision is, in part, as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." No serious contention is urged as to the right of the court upon *habeas corpus* to go behind the warrant of rendition and inquire as to the matter here put in issue. It is the contention, however, of respondents that whenever, upon examination of

the question, it appears that the person sought to be extradited has committed a crime in a sister state and is found within the state issuing the warrant of rendition, it must be at once concluded that such person is a fugitive from justice and that the inquiry there ends. We are cited to *People* v. *Pinkerton,* 17 Hun (N. Y.), 199; *Roberts* v. *Reilly,* 116 U. S. 80, [29 L. Ed. 544, 6 Sup. Ct. Rep. 291]; *Appleyard* v. *Massachusetts,* 203 U. S. 222, 223, [7 Ann. Cas. 1073, 51 L. Ed. 161, 27 Sup. Ct. Rep. 122]; *State* v. *Richter,* 37 Minn. 436, [35 N. W. 9]. These cases are all harmonious to the point that the question of the motive or intent of a person who, having committed a crime in one state, leaves that state and is apprehended in another jurisdiction, is immaterial, and that it will be presumed that his leaving the state within which the offense was committed was with intent to avoid prosecution therefor. Some very broad language is used in *People* v. *Pinkerton, supra,* where the court says: "The charge that he committed a crime in that state, coupled with the fact that he is found in this state, is conclusive upon the question whether he is a fugitive from justice." None of these cases present facts which fit those illustrated by the evidence before us, in that no question was involved as to the act of the accused in departing from the state being other than one governed by his own volition and not under the compulsion of legal process, and therein we think lies a most important distinction. In this case the petitioner had been taken into custody to answer to the charge pending in the state of Texas and the authorities there voluntarily turned him over to the agent of the state of California, to be brought here to answer for the offense alleged to have been committed in California. The California authorities held him in custody and deciding finally not to prosecute him in this state, continued to restrain him of his liberty, and delivered him into the custody of the agent from the state of Texas to be taken back there to answer for the crime which he was not permitted to have trial of when first arrested. This,

we think, may not be done. Cases have arisen where a person having committed a crime in state A, has appeared in state B, there committed another crime and in turn fled to state C, from which latter state he has been extradited and returned to state B. After the authorities of state B no longer desired to hold the prisoner, state A has sought by requisition to extradite him, and the accused by *habeas corpus* has presented the question that having been brought forcibly back into state B from state C, he could not be returned to state A without being first allowed his liberty. The courts have held in such a case that the controlling fact against the prisoner was that he left state A in the first instance through his own volition, and therefore became a fugitive from justice in whatever state he might thereafter be apprehended. Some of these cases are referred to in *Hackney* v. *Welsh,* 107 Ind. 253, [57 Am. Rep. 101, 8 N. E. 141]. The court there in remanding the prisoner lays particular stress upon the fact that the accused was shown to have voluntarily departed from the state which sought his extradition. We find no cause to dispute the proposition as announced in the authorities cited by respondents, that where a person has committed a crime in one state and is found in another state, he will be presumed to have fled from the jurisdiction of the first. But in this case the prisoner did not leave the state of Texas by any voluntary act of his own. He was taken out of the state against his will and under compulsory process at a time when the state of Texas had him in custody with full right and power to prosecute him for the offense for which it now seeks to have him returned. Not only may it be said that he is not a fugitive because he did not voluntarily leave that state, but because also the state of Texas voluntarily relinquished the jurisdiction of its courts over his person and waived its right to thereafter have him brought back from the California jurisdiction to answer for the same offense. In an argumentative way the case of *In re Hess* (*Hess* v. *Grimes*),

5 Kan. App. 763, [48 Pac. 596], is authority for the conclusion last announced.

The prayer of the petition is granted and petitioner is ordered to be discharged from the custody of respondents.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

APPENDIX H

Cases disapproving In re Whittington, 34 Cal. App. 344; factual differences.

In re Martin, 142 Kan. 907, 52 P. 2d 1196 (1935). After conviction in Texas state court, Martin was tried and convicted in Texas federal court and taken to Kansas prison. Court pointed out (p. 910) that there was "material difference" in the facts of *In re Whittington*. There was no showing as to the circumstances under which the United States was permitted to prosecute; it may have been Martin's preference (p. 912). Extradition back to Texas allowed.

State ex rel. Shapiro v. *Wall*, 187 Minn. 246, 244 N.W. 811 (1932). Removal from demanding State was by compulsion of federal authorities; no showing that demanding State participated in any way.

In re Cohen, 104 N.J. Eq. 560, 146 Atl. 423 (1929). Departure from demanding State was by compulsion of federal authorities, without the participation of demanding State.

In re Anthony, 198 Wash. 106, 87 P. 2d 302 (1939). While in custody of California, Anthony asked to confer with a post-office inspector and confessed complicity in a burglary of a post-office in California. He was released to the federal authorities, tried and convicted in a California federal court, and then brought to a Washington federal prison; California did not participate in his removal from the State.

People ex rel. Hutchings v. *Mallon*, 218 N.Y.S. 432, 218 App. Div. 461 (1926). Hutchings asked for and accepted California parole with direction to go to New York. His leaving California, in spite of the direction, must be considered as voluntary.

Ex parte Nabors, 33 N.M. 324, 267 Pac. 58 (1928). Nabors was paroled by California to New Mexico and sought to resist extradition back to California. The Court questioned whether his departure from California was "involuntary," pointing out that he had made application for parole and had requested to be allowed to go to New Mexico (pp. 330-31).

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Case No. 619

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

WATSON MOULTHROPE,
Petitioner

vs.

EDWARD MATUS,
Respondent

RESPONDENT'S BRIEF TO PETITION FOR WRIT OF CERTIORARI

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CORRECTION OF PETITIONER'S STATEMENT

The facts in this case are completely stated in the finding of the Connecticut Superior Court (R. 13-15). The Connecticut Supreme Court of Errors in its opinion summarized the facts stated in the finding (R. 42, 43).

The petitioner's brief to this Court, bottom of page 4 and top of page 5 (quoted reference R. 22-25; 23, 25, 26), recites facts relating to the alleged custody and delivery of the petitioner which are evidently based on the testimony of the petitioner at the trial but were not found as facts in the finding of the trial court. These allegations were not a part of the facts considered by the Connecticut Supreme Court of Errors and are not a part of the record before this Court.

The petitioner in his statement on page 5 of his Brief alleges that in 1948 the Florida Board of Pardons withdrew the conditional pardon granted petitioner in 1928 and ordered his return to custody to serve the unexpired portion of his original robbery sentence "and to serve the sentence of life imprisonment for murder".

In fact, however, the requisition of the Governor of the State of Florida for the return of the petitioner to that state confines the ground of requisition to the crime of robbery and does not include the crime and conviction of murder of March 19, 1930. This fact is established in the finding of the trial court (R. 15, par. 13).

REASONS FOR REFUSING THE WRIT

The question raised is whether the petitioner is a fugitive from justice. The inquiry is one of fact, to be resolved by the chief executive of the state upon which the demand is made. His decision cannot be impeached unless it conclusively appears that the plaintiff could not be, under the law, a fugitive.

Brewer v. *Goff*, 138 F. 2d 710, 712

The motive or purpose or belief of the petitioner at the time of leaving the demanding state is of no consequence. He is nevertheless a fugitive of justice and if found in another state must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated on production of such indictment or affidavit certified as authentic by the Governor of the demanding state. *Appleyard* v. *Massachusetts*, 203 U. S. 222, 227, 27 S. Ct. 122, 51 L. Ed. 161; *Lee Won Sing* v. *Cottone*, 123 F. 2d 169, 172, 76 App. D. C. 176; *Barrett* v. *Bigger*, 17 F. 2d 669, 670, cert. denied, 274 U. S. 752, 47 S. Ct. 765, 71 L. Ed. 1333.

The law is well established that if the prisoner was forcibly removed from the state by federal authorities, he is still a fugitive from justice. *Ex parte Cohen*, 104 N. J. Eq. 560, 563, 146 A. 423; *State ex rel. Shapiro* v. *Wall*, 187 Minn. 246, 249, 244 N. W. 811; *Kelly* v. *Mangum*, 145 Ga. 57, 58, 88 S. E. 556; *Spencer* v. *Hamilton et al.*, 12 F. 2d 976, 977; 29 Col. L. Rev. 1157.

In the case at bar the petitioner was a paroled convict when he left the State of Florida with the consent of the authorities and he nevertheless became a fugitive from justice in Connecticut when his parole was revoked. *Brewer* v. *Goff*, 138 F. 2d 710, 712; *People ex rel. Hutchings* v. *Mallon*, 218 Rep. Div. 461, 471, 218 N. Y. S. 432, aff'd, 245 N. Y. 521, 157 N. E. 842; *People ex rel. Westbrook* v. *O'Neill*, 378 Ill. 324, 327, 38 N. E. 2d 174.

The same rule applies where the paroling state has forced him to leave the state as a condition of parole. *Broyles* v. *Mount*, 197 Ga. 659, 661, 30 S. E. 2d 48.

The petitioner's claim that a delivery by the demanding state constitutes a waiver is unsound. This is the minority view as expressed *In re Whittington*, 34 Cal. App. 344, 167 P. 404. This view is subjected to sound criticism in 29 Columbia Law Review, 1157, where the author points out that by its application "the accused would by a second wrong escape punishment for the first".

The waiver rule would mean in effect that a man who has committed a crime in Connecticut and subsequently commits a crime in Florida in answer to extradition by Connecticut could exercise a choice in the matter. He is placed in the enviable position of deciding his own fate, because the Florida authorities could only disagree at the risk of losing all control over him. Such a rule will cause reluctance in the asylum state to deliver a prisoner to the demanding state. It may well encourage a fugitive from one state to commit a lesser crime in another state to avoid the penalties of the first state. The waiver rule would defeat the purpose of extradition which is to prevent State boundaries from providing those charged with crime with a means of asylum. The decision of the Connecticut Supreme Court of Errors upheld this principle and rightfully repudiated the waiver theory.

It is respectfully submitted that since the petitioner is a fugitive from Florida justice, there was no error in the judgment of the Conencticut Supreme Court of Errors in dismissing the petitioner's writ of habeas corpus.

CONCLUSION

In view of the foregoing reasons the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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